PROBABLE CAUSE: THE FEDERAL STANDARD

I. INTRODUCTION

The fourth amendment establishes freedom from unreasonable searches and seizures and provides that "no warrants shall issue, but upon probable cause."[1] Although the courts are in complete agreement on generalized principles, they have long struggled with the question of what factual situations may constitute probable cause. In the final analysis the term describes a legal concept, the definition of which is used to guide and inform, rather than make, decision of each case on its particular facts. However, the manner in which that definition is used and applied by the federal courts today is of extreme importance to an attorney in attempting to predict whether probable cause exists in his client's case.

For years, the federal standard of probable cause, along with other aspects of the federal law of search and seizure, was of only minor interest to the average practitioner because it had been held that the requirements of the fourth amendment did not apply to the states.[2] Each state was free to formulate its own requirements on the subject, including its own standard of probable cause. With the Supreme Court's ruling in *Mapp v. Ohio*[3] there followed much speculation as to whether a federal standard or some other standard should be used to test the validity of searches and seizures by state officers. At least five different views were taken by different state courts on this question[4] before the Supreme Court finally decided the issue in *Ker v. California*.[5]

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[1] U.S. Const. amend. IV.

[2] See Wolf v. Colorado, 338 U.S. 25 (1949).

[3] 367 U.S. 643 (1961), holding that the guarantees of the fourth amendment against unreasonable search and seizure apply to the states by virtue of the due process clause of the fourteenth amendment and that the exclusionary rule prevents the use of evidence in state courts if such evidence is seized in the course of an unconstitutional search.

[4] 13 Drake L. Rev. 65, n. 4, describes the following five positions: (a) that *Mapp* indicated a federal standard should be used, citing State v. Trumbull, 23 Conn. Supp. 41, 176 A.2d 887 (1961); Commonwealth v. Spofford, 180 N.E.2d 673 (Mass. 1962); (b) that *Mapp* did not require a federal standard, citing Smith v. State, 138 So. 2d 474 (Ala. 1962); Castaneda v. Superior Court, 26 Cal. Rptr. 364 (Ct. App. 1963); Leveson v. State, 138 So. 2d 361 (Fla. 1962); State v. Chance, 71 N.J.S. 77, 176 A.2d 307 (1962); State v. Scharfstein, 73 N.J.S. 486, 180 A.2d 210 (1962); Rees v. Commonwealth, 127 S.E.2d 406 (Va. 1962); (c) that federal cases are only persuasive and not binding authority, citing State v. Chance, *supra*, State v. Scharfstein, *supra*; (d) that federal authorities are controlling where state authority is inconsistent in the same matter, citing Castaneda v. Superior Court, *supra*; Leveson v. State,

In *Ker* the Court held that the federal standard of reasonableness does apply to state court cases and that it is the same standard that applies to cases in the federal courts. Since a search without probable cause is an unreasonable search, the federal standard of probable cause therefore applies to the states along with all other federal standards of reasonableness. In determining probable cause, the Court in *Ker* used the definition previously set forth in the leading cases involving federal law enforcement agencies.[6] The Court in *Ker* did hold that the states would not be precluded from establishing workable rules governing search and seizure calculated to consider local factors, but this concession to the states was conditioned on the proviso that such state rules satisfy the federal standard. Consequently, the federal minimum standard must be reckoned with today in every case involving the law of search and seizure, regardless of the forum.

Before examining how the courts have defined and applied "probable cause," it should be noted that the fourth amendment applies to the area of arrest as well as search.[7] Consequently, the question whether probable cause has been shown arises in the application for any warrant, whether it be for the purpose of arrest or search. In addition, the common law right of a peace officer to arrest without a warrant was not eliminated by the fourth amendment [8] and statutes [9] generally grant such power to law enforcement officials where they have reasonable grounds or cause to believe that a crime has been committed. The terms "reasonable grounds" or "cause" in these statutes have been held to carry the same meaning as the words "probable cause" in the fourth amendment.[10] Finally, the concept also arises where there is a search without a warrant pursuant to or incident to an arrest. In the arrest area the requirement is that there be probable cause to believe the offense has been committed by the person arrested, while in the search area the requirement is that there be probable cause to believe that the item sought is present where the search is conducted. However, the standard is identified by the words "probable cause" in both cases.

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supra; (e) that *Mapp* only required the reasonableness to fall within the standard of the fourteenth amendment, citing Smith v. State, *supra*; Rees v. Commonwealth, *supra*.

[5] 374 U.S. 23 (1963).

[6] *Id.* at 35. The Court used the definition of Carroll v. United States, 267 U.S. 132 (1925), and Brinegar v. United States, 338 U.S. 160 (1949).

[7] See Albrecht v. United States, 273 U.S. 1 (1927).

[8] See Carroll v. United States, 267 U.S. 132 (1925).

[9] See, *e.g.*, 18 U.S.C. § 3052 (1958).

[10] See, *e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963).

II. A Definition of Probable Cause

It has often been stated by the Supreme Court that each case must be decided on its own separate facts and that there is no formula for the determination of reasonableness.[11] As uninformative as this statement is, it is no doubt the most accurate statement that can be made of the Supreme Court's application of the term. However, there are several general definitions of probable cause which have been given by the Supreme Court and which are often quoted by it and by lower courts regardless of the result reached in a given case.

In *Carroll v. United States*,[12] the Court said,

> [Probable cause exists where] the facts and circumstances within [the arresting officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that [an offense has been or is being committed.][13]

And in *Brinegar v. United States*,[14] the Court quoted the language of the *Carroll* case and in addition stated,

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which . . . prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.[15]

Finally, both *Brinegar* and *Carroll* quote with approval the language employed by the Supreme Court of Pennsylvania in *McCarthy v. De Armit*: "The substance of all the definitions [of probable cause] is a reasonable ground for belief of guilt." [16]

Factorial Analysis: Factors Considered

Having looked at the general definitions of probable cause, the next questions are what factors may be considered in forming these definitions and what quantum is sufficient to meet the stand-

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11 United States v. Rabinowitz, 339 U.S. 56 (1950); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

12 Carroll v. United States, 267 U.S. 132 (1925).

13 *Id.* at 162; see also Brinegar v. United States, *supra* note 6, at 175; Husty v. United States, 282 U.S. 694, 700-01 (1931); Dumbra v. United States, 268 U.S. 435, 441 (1925); Steele v. United States, 267 U.S. 498, 504-05 (1925); Stacey v. Emery, 97 U.S. 642, 645 (1878).

14 338 U.S. 160 (1949).

15 *Id.* at 175.

16 99 Pa. 63, 69 (1881).

ard. First of all, in spite of the dictum in *Grau v. United States*[17] to the effect that evidence competent in a jury trial is required to show probable cause,[18] such is not the case. A finding of probable cause is perfectly permissible on the basis of evidence which would not be competent at a trial. No doubt this fact derives from the distinction between the two things to be proved: probable cause and guilt. Whereas guilt must be proved beyond a reasonable doubt in a criminal trial, probable cause requires only a showing of probabilities. The large difference between the two things to be proved is reflected in the quantum and modes of proof required to establish them.[19] Consequently, the probable cause requirement may be met although the proof on which it rests is insufficient to prove guilt or would be inadmissible at a trial to prove guilt.

The factors or elements tending to establish probable cause which a court might consider in any given case are, of course, innumerable. However, a glance at specific factors the Supreme Court has considered or refused to consider, and the weight given them, may prove helpful.

Area

On several occasions the Supreme Court has emphasized that the defendant was arrested and searched in a geographical area that tended to indicate the commission of a crime by the defendant. The first case involving this factor was *The Appollon*,[20] where the issue was whether the seizure of a French vessel at a particular point was upon probable cause that she was there for the purpose of smuggling. Mr. Justice Story, writing for the Court, stated that the Court was bound to take judicial notice of public facts and geographical positions and that it was a matter of general notoriety and public record that the remote part of the country in which the seizure occurred had been infested with smugglers at different periods of time. In *United States v. Lee*,[21] the Court found probable cause to believe that revenue laws were being violated where the arresting Coast Guard officers came upon two schooners anchored side-by-side at night, twenty-four miles offshore in "Rum Row." Again the area was notorious for illicit liquor running. In the *Carroll* and *Brinegar* cases the knowledge of the arresting officers was much more extensive than that of the officers in the two

[17] 287 U.S. 124 (1932).

[18] Wagner v. United States, 8 F.2d 581 (8th Cir. 1925), and Giles v. United States, 284 Fed. 208 (1st Cir. 1922), were cited by the Court to support this proposition.

[19] See Jones v. United States, 362 U.S. 257 (1960).

[20] 22 U.S. (9 Wheat.) 361 (1824).

[21] 274 U.S. 559 (1927).

cases mentioned above. In both *Carroll* and *Brinegar* the officers recognized the defendants personally from past incriminating conduct witnessed by the officers. But, again, in both of these cases the Court, in finding probable cause, emphasized the fact that the defendants were suspected of illicit liquor traffic and that they were driving through active bootlegging territory in the direction of the illicit liquor market and away from the largest source of supply. In neither case did the respective defendants' conduct or appearance at the time of arrest indicate the violation of any law at that particular time.

In *Henry v. United States*,[22] the officers, suspecting the defendants were involved in a recent interstate whiskey shipment theft, watched them pick up packages from an alley in a residential section. The Court, in finding a lack of probable cause for the defendants' arrest and the search of their car, noted the lack of any guilty inference arising from the area of their operations, and stated that the case might have been different if the packages had been picked up from a terminal or interstate trucking platform.

Finally, the latest case to consider geographic area as a factor indicates that the factor in itself is certainly not sufficient to constitute probable cause and that perhaps it will no longer be given the weight it was given in the past. In this case, *Rios v. United States*,[23] two Los Angeles plain clothes policemen observed a taxicab standing in a parking lot next to an apartment house and saw the defendant look up and down the street, walk across the lot, and get into the cab. Neither officer had ever seen the defendant before and neither had any idea of his identity. Neither officer had received any information that anyone was engaged in criminal activity at that time or place, but the neighborhood had a reputation which, coupled with the defendant's manner, led the officers to believe that he was engaged in the commission of a crime. The officers followed the cab for several blocks, and when it stopped for a traffic light, they walked up on both sides, identified themselves, and opened the door. At that point the defendant dropped a package of narcotics on the floor, and one officer grabbed the package while the other grabbed the defendant. The Supreme Court, without deciding when the arrest took place, held that there was no probable cause for the arrest if it took place when the officers took their places at the doors of the cab, rather than when defendant dropped the package.[24]

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[22] 361 U.S. 98 (1959).

[23] 364 U.S. 253 (1960).

[24] It seems likely that the Court would hold that the arrest had occurred when the officers took their places at the doors if it were ever forced to answer the

If the *Rios* case is compared with *The Appollon*[25] and *United States v. Lee*,[26] it appears that the Court has given the geographical factor much less weight in the establishment of probable cause in *Rios* than in the two earlier cases. However, these cases may perhaps be harmonized by recognition of the fact that there is more reason to stress the geographical factor in cases on the high sea than in the normal case where a land area is involved. There is more reason to suspect one of illegal activity by reason of his presence in a remote and suspicious area at sea than by reason of his presence in a heavily populated urban area, regardless of its suspicious character.

In any event, the holding in *Rios* is not at all surprising in light of *United States v. Di Re*.[27] In that case, an informant notified government agents that he was to buy counterfeit gasoline coupons at a given date and place. The agents were there on the stated date and, when they approached the car, the informant showed them the coupons and pointed out the person on the seat beside him as the seller. The defendant was also in the car, but the informant made no reference to him. The Supreme Court held that the arrest and search of the defendant were made without probable cause since his mere presence in the car proved nothing. Since presence in a car in which a specific crime is being committed is not sufficient, in itself, to constitute probable cause, it is only logical that presence in a geographical area with a reputation for illegal activity is likewise insufficient and ought to be given somewhat less weight in the establishment of probable cause than the early cases seemed to accord it.

Previous Criminal Activity

Another factor which the Supreme Court has considered in the establishment of probable cause is recent contact between the arresting officers and the defendant which indicated that the defendant was engaged in illegal activity at the time of contact and therefore might also be so engaged at the time of arrest. Although other persuasive factors have been present each time this factor has been presented in a case before the Supreme Court, it is interesting to note that in all of the cases where it has been so presented, the Court has found probable cause for the arrest and search. In *Carroll*

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question. See Henry v. United States, 361 U.S. 98 (1959), where it was conceded by the government that the arrest took place at the time the car was stopped in a similar situation.

[25] *Supra* note 20.

[26] *Supra* note 21.

[27] 332 U.S. 581 (1948).

v. United States,[28] the arresting officers had met the defendants while posing as prospective buyers of illicit whiskey. The defendants, after negotiating a deal to sell such whiskey to the officers, left the apartment and never returned with the whiskey. More than two months later the officers were on patrol when the defendants drove past them. The officers recognized the car and the defendants; they stopped the car, searched it, and found sixty-eight bottles of illicit whiskey. In *Brinegar v. United States*,[29] the arresting officers were similarly on patrol when the defendant drove past in a car which appeared heavily loaded. One of the officers had arrested the defendant five months earlier for illegally transporting liquor and had seen him loading liquor into his car on several other occasions. And in *Husty v. United States*,[30] the arresting officer received information which he believed reliable that the defendant possessed illegal liquor in a specific automobile at a particular location. In all three of these cases the Court laid heavy emphasis on the personal contact between the respective officers and defendants and the knowledge acquired therefrom in arriving at a finding of probable cause.

Probably the most controversial and most recurrent factor present in cases today is that of the hearsay statement of the third party informant. A more exhaustive discussion of this area will be attempted below, but suffice it to say at this point that such statements are considered by the Court.[31] There would seem to be some misunderstanding among the lower courts as to what weight the Supreme Court's standard accords the informer's statement, but there is no disagreement that it may be considered, since, as was noted above, evidence need not be of a type admissible at trial in order to be considered on a question of probable cause.

Time

The Court may feel compelled to hold that probable cause does not exist where the period of time elapsing between the acquisition of knowledge of the facts which lead an officer to believe that a crime is being committed and the issuance of a warrant or an arrest without a warrant is too long. The Supreme Court's statement on this factor is found in *Sgro v. United States*:[32] "[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable

[28] *Supra* note 12.

[29] *Supra* note 14.

[30] 282 U.S. 694 (1931).

[31] See Draper v. United States, 358 U.S. 307 (1959); Jones v. United States, *supra* note 19.

[32] 287 U.S. 206 (1932).

cause at that time."[33] That case involved the construction of a statute which provided for the issuance of a warrant.[34] The statute used the term "probable cause" and the Court found that no such probable cause existed where the warrant was issued on July twenty-seventh, the evidence having been compiled and presented on July sixth.[35]

Factorial Analysis: Factors Excluded

Submission to Arrest

Having noted several factors which the Court does consider, it would now seem appropriate to mention that there are some factors which the Court refuses to consider in arriving at a determination on a question of probable cause. First of all, in *United States v. Di Re*[36] the Court refused to consider the fact that the defendant had submitted to arrest without an argument or resistance. The opinion stated that "probable cause cannot be found from submissiveness, and the presumption of innocence is not lost or impaired by neglect to argue with a policeman."[37] The Court's refusal to consider this factor seems somewhat inconsistent with the general rule in the determination of probable cause, stated in the following words:

> But the general constitutional standard . . . require[s] only that there be reasonable belief of guilt. This is not so high a standard as to preclude arrest where an innocent construction of the acts of the defendant is possible.[38]

Most factors are treated as subject to consideration even though they are perfectly consistent with an innocent interpretation, and it is not entirely clear why the non-protest factor should be treated differently. Generally, the innocent interpretation goes only to weight and not to admissibility, so to speak, but here the interpretation seems to rule out the factor from consideration

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[33] *Id.* at 210.

[34] The National Prohibition Act § 25, 41 Stat. 305, 27 U.S.C. § 39, authorized the issuance of warrants to search for intoxicating liquors as provided in Title XI of the Act of June 15, 1917, 40 Stat. 228.

[35] The original warrant had been issued on July sixth and the statute provided that any warrant not executed within ten days of issuance was void. Since the first warrant was not executed within ten days it was re-issued, but the Court held that the statute did not provide for re-issuance and, therefore, that it must be a new warrant and that no probable cause existed for issuance of a warrant on July twenty-seventh because of the time lapse.

[36] 332 U.S. 581 (1947).

[37] *Id.* at 595.

[38] United States v. Bianco, 189 F.2d 716, 720 (3d Cir. 1951).

entirely. Perhaps this treatment is consistent with the more frequently stated rule that the fourth amendment and legislation regulating the criminal process should be liberally construed in favor of the individual.[39]

An analogous situation to this treatment of the non-protest factor is the Supreme Court's treatment of a suspect's furtive gestures when such gestures are provoked by the unlawful conduct of the arresting officer. Perhaps the Court's refusal to consider the non-protest factor is explained by the same reasons which lead the Court to decline consideration of such furtive gestures—that this represents the reaction of a normal citizen and does not necessarily arise from a sense of guilt. A more complete discussion of the furtive gesture factor is set out below. Suffice it to say at this point that the Supreme Court, in the absence of provoking conduct by the officer, does consider such factors in reaching a determination on questions of probable cause, although the weight given them is slight.

Good Faith

The good faith of the arresting officers, it would seem, should be of no relevance in a determination of probable cause. Whether the standard of probable cause is met should be a determination made by a judicial officer based on the facts known to the officers, not on the officers' feeling. Although the Court has not completely ignored this factor, it has accorded it very little weight.[40]

Before looking to see what the Supreme Court has done with the general ideas in the area of probable cause, it must be kept in mind that the time at which probable cause must exist is before the search or arrest: fourth-amendment protection extends to the innocent and guilty alike[41] and the fact that the defendant is caught "red-handed" does not cleanse or justify a search made without probable cause.[42] In the same vein, the Supreme Court has also held that where a warrant is sought, whether or not it was issued on probable cause depends on the statements made in the affidavits in support thereof and, if the affidavits state only the affiant's belief without the facts on which belief is based, no probable cause is stated.[43]

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[39] See United States v. Di Re, 332 U.S. 581 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932); Marron v. United States, 275 U.S. 192 (1927); Byars v. United States, 273 U.S. 28 (1927); Boyd v. United States, 116 U.S. 616 (1886).

[40] Director General v. Kastenbaum, 263 U.S. 25 (1923); Henry v. United States, *supra* note 22.

[41] See Trupiano v. United States, 334 U.S. 699 (1948); McDonald v. United States, 335 U.S. 451 (1948); Byars v. United States, *supra* note 39.

[42] United States v. Di Re, *supra* note 27.

[43] Jones v. United States, *supra* note 19; Nathanson v. United States, 290 U.S. 41 (1933); Byars v. United States, *supra* note 39.

III. The Required Quantum of Probable Cause

Quantum Fluctuation: Gravity of the Offense

To assert that the standard of probable cause necessary to validate a search or arrest should fluctuate with the seriousness of the offense involved would seem to be a very tenable position. Such a position is supported by the Restatement of Torts,[44] which lists the seriousness of the offense as a factor to be considered in determining the lawfulness of a warrantless arrest. The argument in favor of this position is well stated as follows:

> Even under a probable cause to obtain a warrant test, the lawfulness of any given warrantless arrest should depend on the totality of circumstances, and it is a mistake ever to hold that the Fourth Amendment has no room for such obviously relevant factors as . . . the seriousness or violent or non-violent nature of the offense for which the arrest is made.[45]

However, the authority for such a position is at best shaky. The only supporter of such a position ever to sit on the Supreme Court seems to have been Mr. Justice Jackson. And in the two instances when he expressed his views in this regard he was forced to do so in a dissenting and concurring opinion. Dissenting in *Brinegar v. United States*,[46] and objecting to what he felt was a blanket authority to search automobiles on mere suspicion, he said:

> But if we are to make judicial exceptions to the Fourth Amendment for these reasons, [referring to the special problems presented law enforcement agencies by the use of the automobile] it seems to me they should depend somewhat upon the gravity of the offense.[47]

He then went on to suggest that a search of every car on the road, if conducted fairly and in good faith, might be justified without probable cause if a kidnapping were involved and random search was the only way to save the child's life and detect the vicious criminals. But he would not have sustained the same roadblock to catch a bootlegger even if it were the only way. In his concurring opinion in *McDonald v. United States*[48] he suggests that the Court in practice actually does recognize such a fluctuating standard when he says:

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[44] Restatement, Torts § 119, comment j (1934).

[45] Broeder, "Wong Sun v. United States: A Study In Faith And Hope," 42 Neb. L. Rev. 483, 515 (1962).

[46] 338 U.S. 160 (1949).

[47] *Id.* at 183.

[48] 335 U.S. 451 (1948).

> Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it.... While I should be human enough to apply the letter of the law with some indulgence to officers acting to deal with threats or crimes of violence which endanger life or security, it is notable that few of the searches found by this Court to be unlawful dealt with that category of crime. Almost without exception, the overzeal was in suppressing acts not *malum in se* but only *malum prohibitum*.[49]

Although Mr. Justice Jackson may have been correct in his analysis of the cases and the types of crimes involved in those where the search was found unlawful, the Court has never recognized that the standard differs with the type of crime involved. Perhaps the Court's refusal to make such a recognition arises from a fear that to do so would be to add too great a subjective factor to an already highly subjective area. In any event, it seems safe to say at this point that the Court will not look with favor on an argument that a diminished probable cause requirement should exist in a given case due to the seriousness of the offense involved. I would be inclined to think that the Court would answer such an argument with language similar to the following:

> The damnable character of the . . . business should not close our eyes to the mischief which will surely follow any attempt to destroy it by unwarranted methods. 'To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an eminent good by means that are unlawful, is as little consonant to private morality as to public justice.'[50]

Quantum Fluctuation: Arrest Without A Warrant

From time to time it has been suggested that a less stringent standard of probable cause is applied in justifying a warrantless arrest than is applied in justifying the issuance of a warrant.[51] However, a study of four Supreme Court cases decided within the last seven years convinces one that just the opposite is the case.

In *Mallory v. United States*[52] the Court explicitly states that police officers may arrest only on probable cause—not on mere

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[49] *Id.* at 459-60.

[50] Mr. Justice McReynolds, dissenting in Carroll v. United States, 267 U.S. 132, 163 (1925).

[51] See, *e.g.*, Barrett, "Police Practices and the Law—From Arrest to Release or Charge," 50 Calif. L. Rev. 11, 20 (1962); Collings, "Toward Workable Rules of Search and Seizure—An Amicus Curiae Brief," 50 Calif. L. Rev. 421 (1962).

[52] 354 U.S. 449 (1957).

suspicion—and goes on to state that officers cannot arrest and interrogate in order to determine whom they should charge before a committing magistrate on probable cause. The Court refers to these two distinct times when probable cause is required—at the time of arrest and at the time of committment—in the same breath,[53] without making any distinction as to the weight of facts necessary to meet the requirement at the two different times.

However, if the above case were not enough to settle the question, it should have been permanently put to rest in 1960 in *Jones v. United States*.[54] In that case, which involved the execution of a search warrant for narcotics, the Court upheld the warrant as having been issued on probable cause and in doing so cited *Draper v. United States*[55] for the proposition that the facts before the magistrate did constitute probable cause. *Draper* involved a warrantless arrest and consequently its citation in *Jones* indicated that the Court was equating the standard to be applied in the two situations. Furthermore the language of the Court in *Jones* further substantiates that proposition.

> If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is sought, warrants could seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safeguard governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.[56]

Finally, in *Wong Sun v. United States*,[57] the Court definitely stated that the standard of probable cause necessary to arrest without a warrant is at least as stringent as that required for the issuance of a warrant and then went one step further to suggest that the standard in the former situation may, in fact, be more stringent. The Court said:

> Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent

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[53] *Id.* at 456.
[54] 362 U.S. 257 (1960).
[55] 358 U.S. 307 (1959).
[56] *Supra* note 54, at 270-71.
[57] 371 U.S. 471 (1963).

where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained.[58]

Quantum Fluctuation: Federalism

Now that *Mapp v. Ohio*[59] has extended the exclusionary rule to the states, there is some suggestion that the Court is relaxing the standard of probable cause so as to invalidate fewer state arrests and searches. The theory is that the capabilities of different local law enforcement agencies differ and that the federal standard may prove too stringent. That is, it is feared that the federal standard might prove too great a hindrance to efficient law enforcement on the local level.

A lowering of the standard of probable cause may in fact have occurred, but it did not result from the extension of the exclusionary rule to the states. If the standard was lowered, it began with and had its greatest advance two years before the *Mapp* case in *Draper v. United States*.[60] In that case an informer, who was paid small sums of money by the Bureau of Narcotics and who had given accurate and reliable information in the past, informed a special narcotics agent that Draper was peddling narcotics from his abode. Four days later the same informer forwarded information that Draper had gone to Chicago by train and would bring back to Denver three ounces of heroin. He also said that Draper would return from Chicago on either the eighth or ninth of September on the morning train from Chicago and gave a complete physical description of Draper. Finally, he said that Draper would be carrying a tan zipper-bag and habitually walked quite fast. The agents stationed themselves at the train station and on the second morning they saw a man who fit the informer's description perfectly get off the train from Chicago and quickly walk toward the exit gate with a tan zipper-bag in hand. They arrested and searched him and found two envelopes of heroin and a syringe. The Court held that probable cause existed for the arrest. The Court relied upon the fact that, except for whether Draper had accomplished his mission, every fact of the hearsay information given by the informer had been verified or corroborated at the time of the arrest. The Court seemed to ignore the fact that whether Draper had committed a crime rested on the question of whether or not he had accomplished his mission. Had he not so accomplished his mission, all the other corroborated information would have been irrelevant regardless of its accuracy.

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[58] *Id.* at 479.

[59] 367 U.S. 643 (1961).

[60] *Supra* note 55.

When *Draper* is compared with *Henry v. United States*[61] and *Giordenello v. United States*[62] there appears to be an inconsistency —the standard of probable cause seems to have diminished. To a substantial degree this appearance is accurate. In both the latter cases, the arresting officers had received information implicating the ultimate defendants and had put them under surveillance. In *Giordenello* a warrant was procured on the basis of this information and in *Henry* there was no warrant. In both cases the officers followed the respective defendants and arrested them after observing what they felt was suspicious conduct. The Court refused to find probable cause in either case and struck down both arrests and searches mainly on the basis that the officers had no personal knowledge of any crime being committed and that no facts were set out from which such personal knowledge could be drawn. That is, the facts, if any, on which the informers based their belief were not set out. In addition there were no facts on which the officers could base such a belief. This personal knowledge requirement was also absent in *Draper*. The officers had no personal knowledge of any facts which could have led to the conclusion that Draper was a narcotics supplier, and there is no indication that the facts on which the informer based his belief were communicated to either the officers or the court. Since *Draper* came before *Henry* in point of time and since *Henry* seems to be out of the same mold as *Giordenello*, it cannot be said that *Draper* dispensed with the personal knowledge requirement. Neither can it be said, as some have contended,[63] that the Court in *Draper* found personal knowledge, though on extremely tenuous facts. Rather, it must be said that the Court distinguished *Draper* and substituted the corroboration of the informer's story in place of the personal knowledge requirement. It is true and must be recognized that there was a substantial amount of corroboration in *Draper* which did not exist in either of these other cases. Another distinguishing factor is that in *Draper* the identity of the informer, his position or relationship with the Bureau of Narcotics, and the facts which led the officers to act were fully revealed to the court; in *Henry* and *Giordenello* these facts never were fully revealed. This factor may have had an effect on the outcome in these cases.

Two other cases relating to the determination of whether or not probable cause is being diluted are *Ker v. United States*[64] and

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[61] 361 U.S. 98 (1959).

[62] 357 U.S. 480 (1958).

[63] See, *e.g.*, 28 Geo. Wash. L. Rev. 661 (1960).

[64] 374 U.S. 23 (1963).

United States v. Rugendorf.[65] Those who feel that the Supreme Court is relaxing the standard since *Mapp* [66] cite the *Ker* case as establishing that position. In *Ker* a state officer posing as a buyer of narcotics negotiated a deal with a known seller. They went together to a bowling alley to meet the seller's contact and the officer waited in the car. The seller came out shortly and pointed out a 1956 DeSoto as his connection's car saying they were to meet him "up by the oil field" where he kept his supply. As they neared that location the officer saw the DeSoto again. They parked and soon the DeSoto pulled up beside them. The officer recognized the driver from a "mug shot" as one Murphy, a large-scale dope peddler then free on bail. The officer waited while his seller and Murphy went up into the hills. They returned in a short time with a package of marijuana which was later cut at the seller's house. The officer took what he had received and reported back to two other officers, one of whom had observed the above occurrences. The next day Murphy was put under surveillance and the officers, after losing him in traffic, went to the oil field to wait. Parked across the street from them was Ker. Murphy drove past and soon returned to park behind Ker. He walked up to Ker's car as the officers watched through glasses from one thousand feet away. It was too dark for them to tell if anything was passed between Murphy and Ker, but they drove by and got Ker's license number plus a good look at his face. When Ker left, the officers tried to follow him but lost him when he made a U-turn in the middle of the road. They then got Ker's name and address by checking his license. They communicated all of the above facts to officer Berman who had received information in the past from a reliable informer that Ker was selling marijuana in his apartment and was getting it from a Murphy. On this combination of facts the officers went to Ker's apartment, got a pass key, entered, arrested the defendant, and seized the marijuana they found.[67]

A comparison of the facts in *Ker* with those in *Draper* leads to the conclusion that the officers in *Ker* had at least as much, if not more, cause to believe that the defendant was committing a felony as they did in *Draper*. In *Ker* the corroboration of the informer's story went to the fact that the crime was being committed as reported, not merely to the informer's reliability as in

[65] 376 U.S. 528 (1964).

[66] *Supra* note 59.

[67] On entering the apartment the officers immediately saw a block of marijuana in plain sight, but this does not concern us here, because the arrest obviously occurred with the opening of the door. Neither are we concerned with the question of the legality of the manner of entry because that does not affect the question of probable cause.

Draper. Consequently, this writer asserts that the case for the state in *Ker* was much stronger than in *Draper*, and therefore, *Ker* represents no relaxation of the standard of probable cause from a *Draper* standpoint.

The *Ker* case also compares favorably with the line of cases represented by *Giordenello* and *Henry*. The officers in *Ker* had considerable personal knowledge which led to their belief that the defendant was committing an offense. They had been in the same place at the oil field the night before when Murphy had delivered marijuana to one of them. There was little reason to frequent the area due to its remoteness, but Murphy did return to the same spot at the same time when he met Ker. Under these circumstances, the officers, in using their normal reasoning facilities,[68] could come to but one conclusion. Under any test of probable cause these facts should qualify.

On the other hand, the *Rugendorf* case, considered with *Draper*, does offer some support for the proposition that the standard of probable cause is being relaxed. In that case the affiant officer swore that a reliable informer had reported to affiant that he had seen eighty furs in the defendant's basement and that he had been told they were stolen furs. The affidavit pointed out the informer's detailed description of the furs and that the affiant had checked the records of fur thefts and found only one recent theft in which the furs taken matched the description given by the informer. Finally, affiant swore that a reliable informant had informed him that the defendant's brother was a fence for professional burglars. The corroboration here, unlike that in *Draper*, did go to the commission of the crime and not merely to the reliability of the informer. But in spite of this the corroboration in *Rugendorf* seems very weak; therefore, the argument is persuasive that this case represents a second step toward a relaxing of the standard of probable cause. In fact, it seems quite likely that the defendant would have prevailed on the question of probable cause in *Rugendorf* had not the affidavit in support of the warrant been so complete. The affidavit contained a complete statement of the experience which led the informer to believe that the crime had been committed. Thus the personal knowledge requirement of *Henry* was met even though the personal knowledge belonged to the informer and not to the officer. This may have been the deciding factor in the case.

There is still another reason why it seems that the standard of probable cause is being relaxed. In the *Ker* case and more

[68] See Carroll v. United States, 267 U.S. 132 (1925).

significantly in *Rugendorf*, there were dissenting opinions;[69] and yet in neither case did the dissenters mention the issue of probable cause. They assumed that the requirement had been met. From this it seems arguable that even those members of the Court who have in the past favored a stringent standard may have become willing to moderate their views in favor of more efficient law enforcement.

IV. Evidence Required To Establish Probable Cause

Hearsay: Sufficiency and Corroboration

It is obvious from a reading of the *Draper*[70] case that hearsay information may be enough in and of itself if properly corroborated. However, the more meaningful questions would seem to be, how much and what corroboration is required?

On first reading, *Draper* seems to say merely that if hearsay is corroborated it may be considered as one factor in tending to establish probable cause but that in itself it does not establish probable cause. However, the only thing the officers in *Draper* had before them which tended to prove that Draper was committing an offense was the informer's statement. Everything else tended only to demonstrate the informer's reliability and not that a crime was being committed. Consequently, it must be said that in *Draper* bare hearsay evidence of a crime and an overwhelming amount of evidence of the informant's reliability was enough.

In the *Rugendorf*[71] case, the corroborating evidence was less voluminous, but what there was went to the commission of the crime. That is, the officers had not only the informer's hearsay statements but also the officer's findings from checking the records, both sources of information tending to indicate the commission of the crime. In the *Ker*[72] case the corroboration also tended to prove the commission of the crime and not the reliability of the informer, but that case would seem not to be a pivotal one anymore, because *Rugendorf* involves the same pattern in terms of corroboration of hearsay and it seems to require much less along those lines than does *Ker*.

The conclusion then must be that the degree of corroborative evidence necessary to make hearsay sufficient in itself to establish probable cause depends on what the corroborative evidence tends

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[69] In *Rugendorf*, Mr. Justice Douglas wrote the dissenting opinion and was joined by the Chief Justice, Mr. Justice Brennan and Mr. Justice Goldberg; In *Ker*, the same four dissented with Mr. Justice Brennan writing the opinion.

[70] *Supra* note 55.

[71] *Supra* note 65.

[72] *Supra* note 64.

to prove. It must be assumed from past cases and from the vigorous dissent in *Draper* that the holding there represents an outer limit in a borderline case. Consequently, it is likely that where the corroborative evidence tends to prove only the informer's reliability, probable cause will be found only where the amount or volume of such corroborative evidence is overwhelming. However, on the basis of *Rugendorf* it is only fair to assume that if the corroborative evidence tends to prove the accuracy of the hearsay statement, much less corroborative evidence, in terms of volume, will be required for the establishment of probable cause. This assumption is likely to prove accurate especially if the officers are completely honest with the court and lay before it their entire file, being careful to include therein the informer's experience and all of his personal knowledge which led him to believe the information he gave the law enforcement agency.

Hearsay: The Reliable Informer In The Lower Federal Courts

The next question to be considered is to what extent the lower federal courts, in light of *Draper*, have found reliability of the informer, in and of itself, to be sufficient corroboration for probable cause. In this regard, it must be remembered that in *Draper* there was both a record of past reliability and corroboration of present reliability. Also of significance is *Jones v. United States*,[73] where probable cause for the issuance of a warrant was found on the basis of a record of past reliable information from the informant together with information from other sources which corroborated

ɔwer courts following *Draper*, almost without exception, result that no corroboration is necessary to establish :ause if the informer is shown to be reliable. However, nsiderably beyond the *Draper* facts in finding reliability o excuse the need for evidence corroborative of the crime reas in *Draper* there was evidence of both past reliability ıt reliability, the lower courts will find that probable been established, without the presentation of evidence ive of the crime itself, if evidence of past reliability or f present reliability exists. They do not require evidence short, a review of the lower court cases indicates (a) if ɔrroborative of present reliability is presented, probable be found regardless of the lack of evidence corroborative ıe itself and the lack of a record of past reliability,[74] (b)

S. 257 (1960).

v. United States, 307 F.2d 618 (D.C. Cir. 1962); Hawkins v. United 2d 537 (8th Cir. 1961); Castle v. United States, 287 F.2d 657 (5th Cir.

a record of past reliability alone is generally not a sufficient basis on which to establish probable cause,[75] but if the information comes from a paid informer or one employed for the purpose of uncovering such information the past record alone may suffice,[76] and (c) if there is a record of past reliability and evidence of present reliability, probable cause has been established.[77]

A brief look at several lower federal court cases may clarify the above analysis. In *Rodgers v. United States*[78] customs officers on the California-Mexico border stopped two men returning from Mexico. After extensive interrogation, one of them admitted that they had purchased heroin in Mexico and stated that the defendant —the other man's wife—was bringing it back into the United States on foot. He stated that she could be found in the San Diego bus station and would be carrying the heroin. He indicated that he had previously worked as an informer with federal narcotics agents in the San Francisco area, but the customs agents were unable to confirm this; consequently, they had no basis for believing that he had a record of reliability as an informer. Nevertheless, they proceeded to the bus station and arrested the defendant after the informer pointed her out. The heroin was discovered on her person at the police station, and she was subsequently convicted. In the final analysis, the officers had no evidence of past reliability, and the only evidence of present reliability was that the defendant was found where the informer said she would be, not where her husband said she was, and that the car in which the men were riding had several suitcases in the trunk, indicating that defendant's husband was lying when he said they had been in Mexico only for the day. Nevertheless, the court found that probable cause had been established by the limited amount of evidence of present reliability alone.

Another example of reliance on present reliability alone is *McDermott v. John Baumgorth Co.*,[79] where the court issued and

1961); McDermott v. John Baumgorth Co., 286 F.2d 864 (7th Cir. 1961); Rodgers v. United States, 267 F.2d 79 (9th Cir. 1959); United States *ex rel* Campbell v. Rundle, 216 F. Supp. 41 (E.D. Pa. 1963); United States v. Vasquez, 183 F. Supp. 190 (E.D.N.Y. 1960).

[75] Price v. United States, 262 F.2d 684 (10th Cir. 1959); United States v. Blitz, 199 F.Supp. 326 (E.D.N.Y. 1961).

[76] DiBella v. United States, 284 F.2d 897 (2d Cir. 1960) (dissent); United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960); Williams v. United States, 273 F.2d 781 (9th Cir. 1960); Butler v. United States, 273 F.2d 436 (9th Cir. 1959).

[77] United States v. Prince, 301 F.2d 358 (6th Cir. 1962); United States v. One 1957 Ford Ranchero Pickup Truck, 265 F.2d 21 (10th Cir. 1959); United States v. Jordan, 216 F. Supp. 310 (S.D. Ill. 1963); United States v. Casanova, 213 F. Supp. 654 (S.D.N.Y. 1963).

[78] 267 F.2d 79 (9th Cir. 1959).

[79] 286 F.2d 864 (7th Cir. 1961).

enforced a summons on grounds of suspected fraudulent tax returns of a corporation.[80] The only evidence was the tip of a former vice president of the corporation, the present reliability of which was corroborated by a similar tip from a former accountant. Neither individual had ever been an informant, but the court found that probable cause was established.

Butler v. United States[81] exemplifies the line of cases holding that past reliability alone is a sufficient basis for the establishment of probable cause when the informer is paid or is employed for that purpose. In that case narcotics agents obtained entrance into defendant's apartment by ruse and arrested and searched him strictly on the basis of a tip from a paid informer who had been reliable in the past. There was nothing which in any way substantiated the information of the informer or even his present reliability, but the court found probable cause had been established. The court emphasized the fact that in *Draper* the Supreme Court had noted that the informer was employed for the purpose of uncovering information.

Also worthy of mention is the fact that in corroborating an informer's tip through the use of facts which indicate his present reliability, the existence of two or more informers is helpful. The courts rely on the *Jones*[82] case in holding that two informers giving the same information tend to corroborate each other.[83] Consequently, it is possible to have no evidence other than the tips of two informers and to have a court find that probable cause has been established through the corroboration of the hearsay statements by the informer's present reliability.

Where the informer is of unknown identity or reliability the courts are generally unwilling to find that probable cause has been established unless corroborating evidence of the crime itself is presented.[84] In *Wong Sun v. United States*[85] the Supreme Court was confronted with a case of an informer of unproven reliability. There was a disagreement between the majority and dissenting

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[80] In this case the court held that in ordering the enforcement of a summons the district court should apply the same test that it would apply in deciding whether an arrest by an officer without a warrant complied with constitutional and statutory requirements.

[81] 273 F.2d 436 (9th Cir. 1959).

[82] *Supra* note 73.

[83] United States v. One 1957 Ford Ranchero Pickup Truck, *supra* note 77; McDermott v. John Baumgorth Co., *supra* note 74; Hawkins v. United States, *supra* note 74; United States v. Rundle, *supra* note 74; United States v. Murphy, 174 F. Supp. 823 (D.D.C. 1959).

[84] Cochran v. United States, 291 F.2d 633 (8th Cir. 1961); Contee v. United States, 215 F.2d 324 (D.C. Cir. 1954). *Contra,* United States v. Copes, 191 F. Supp. 623 (D. Md. 1961).

[85] 371 U.S. 471 (1963).

opinions over the question of how specific the informer's information was, but there is no dispute over the fact that his reliability was not proved by past performance. Furthermore, according to the majority opinion, the informer's information was not sufficiently accurate to lead the officers directly to the suspect. Therefore, his past reliability was not corroborated and his present reliability was not subject to corroboration because the information given was not specific enough. Whether or not the Court would have found probable cause solely on corroboration of present reliability, as some of the lower federal courts have done, is debatable; but since neither past nor present reliability was corroborated and since no other evidence indicated guilt, the Court found probable cause to be lacking.[86]

Hearsay: The Officer as Hearsay Declarant

The lower courts seem to be unanimous in holding that where an officer receives information through some mode of communication from another officer in a different part of the country, he may rely on it for an arrest and search of the person implicated. This would seem to be reasonable if the forwarding officer himself had probable cause for such an arrest. The well reasoned cases include a proviso to this effect in their opinions. They provide that the arresting officer need not have probable cause if his source of information (another officer) did, but that the arresting officer who relies on the summary assertions of the other officer can acquire therefrom no greater authority than could have been exercised by the latter if he had been the arresting officer.[87] In addition,

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[86] *Wong Sun* raises an interesting question whether reliability should be accorded the word of an informer who is a prisoner, absent a past record of reliability. The majority in *Wong Sun* did not feel that this would be wise, but the dissent favored the adoption of such a rule. The dissent reasoned that the informer should have been presumed reliable, thus corroborating his statement and establishing probable cause, because the information he gave tended to implicate him in a crime and was thus a declaration against interest. The dissent also pointed out that a prisoner who is confronted with prosecution is likely to give reliable information because he knows that his story will be checked and that discrepancies in it may go hard with him. This is an interesting theory and will no doubt be pressed by the government in the future since it has now been considered in the Supreme Court. Already one case, Williams v. United States, 219 F. Supp. 666 (S.D.N.Y. 1963), has adopted the theory in the process of distinguishing *Wong Sun*. In *Williams* the informer had confessed and had informed narcotics agents that his supplier was due in about an hour. The agents waited and arrested defendant when he arrived. The court stated, "Williams had confessed and was obviously attempting to curry favor with his captors. It would be ignoring reality to suppose that Williams would have deliberately misled the agents who could and did verify his statement in a relatively short time after it was given." *Id.* at 673.

[87] United States v. McCormick, 309 F.2d 367 (7th Cir. 1962); United States v. Bianco, 189 F.2d 716 (3d Cir. 1951).

there is authority in the lower courts for the position that if the information is communicated to the arresting officer through an official source he may rely on the information and arrest in accordance with it even though the source is unknown to him.[88] In other words the official nature of the mode of communication is sufficient corroboration to establish probable cause without any knowledge of the source. This of course leaves open the question of what happens if the source of the information was without sufficient knowledge to constitute probable cause.

Initially these cases may appear harsh, but it must be recognized that any other approach would play havoc with all semblance of efficient law enforcement; therefore, they must be accepted. The courts, however, should not allow themselves to slip into a position where the use of modern communication isolates the police officer from continued scrutiny under the fourth amendment.

Observation: Furtive Gestures

A furtive gesture is defined as an action on the part of a suspect, in the presence of law enforcement officers, which leads them to believe or solidifies their belief that he is guilty of a given offense. Since all such gestures are generally subject to possible innocent interpretations, the question arises as to whether such gestures are relevant in establishing probable cause. The imaginable number of furtive gestures is infinite, but the most common action on the part of a suspect which the government feels should be relevant in the establishment of probable cause is flight.

A study of the pertinent Supreme Court cases leads to the conclusion that the display of a furtive gesture by a suspect prior to his arrest is generally relevant to the issue of whether or not probable cause for arrest existed. However, the weight accorded such a factor by the Court has been minimal. The fact that the Court does consider such factors relevant is best indicated by the language of *Henry v. United States,*[89] a case not involving a furtive gesture, where the Court, speaking of defendants' actions and finding no probable cause, said, "Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that are outwardly innocent. Their movements in the car had no *mark of fleeing men or men acting furtively.*" [90] This language indicates that the Court would consider relevant any action by a defendant which did have the mark of a fleeing man or a man acting furtively.

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[88] United States v. Juvelis, 194 F. Supp. 745 (D.N.J. 1961).

[89] 361 U.S. 98 (1959).

[90] *Id.* at 103. (Emphasis added.)

Husty v. United States[91] and *Brinegar v. United States*[92] are further evidence that the Court does consider furtive gestures relevant. In *Husty* the Court explicitly cites the flight of defendant's companions on the approach of the officers as one of the factors which led to the establishment of probable cause for defendant's arrest and the search of his automobile. In *Brinegar,* where the defendant was apprehended only after a lengthy chase down an open highway, the Court found that probable cause was established where the arresting officer had substantial ground for believing that the defendant was engaged in an illegal activity and the circumstances under which the arrest was made were not such as to indicate the suspect was going about legitimate affairs. However, the weight accorded the flight in these cases was not substantial. In fact, in *Husty* there is little doubt that the Court would have found probable cause even if there had been no flight, and in *Brinegar* the Court did find that probable cause existed before the flight commenced.

In addition, there are two Supreme Court cases, *Miller v. United States*[93] and *Wong Sun v. United States,*[94] which refuse to consider the flight of the defendant as relevant. In both of these cases the defendant slammed the door of his home in the arresting officers' faces and fled. In both instances the Court found that flight was not relevant in that it did not tend to prove guilt or establish probable cause. However, this approach by the Court is explained by the fact that in both cases the officers' manner of entry was unlawful. That is, in *Miller* the officers knocked on the defendant's door and when he inquired as to their identity they merely whispered "Police" so that he could not hear them. As a result, defendant opened the door without receiving from the police notice of their purpose and authority, as required by law.[95] Likewise, in *Wong Sun* the officer misrepresented his reason for being there and thus induced the defendant to open the door without giving him notice of purpose and authority. The Court in both cases felt that the unlawful manner of entry by the officers rendered the defendant's flight irrelevant simply because such flight might have been provoked by the officer's conduct, not necessarily by defendant's sense of guilt; and was, therefore, ambiguous. In short, the Court felt that the conduct of the officers had a tendency to cause even the normal citizen to act in a furtive manner and that, there-

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[91] 282 U.S. 694 (1931).
[92] 338 U.S. 160 (1949).
[93] 357 U.S. 301 (1957).
[94] *Supra* note 57.
[95] 18 U.S.C. § 3109 (1958).

fore, the defendants' gestures were more susceptible to an innocent interpretation than a guilty one. The fact that these cases involved the invasion of the defendants' privacy in their homes rather than merely their automobiles was even more reason to believe that their reactions were those of normal citizens and did not necessarily indicate a sense of guilt.

From these cases it seems fair to say that the Supreme Court feels that furtive gestures are relevant to establish probable cause, except where those gestures are provoked by the unlawful conduct of the arresting officer, but that the weight given to them will not be great. The failure to accord much weight to furtive gestures was continued in *Ker v. California.*[96] The Court barely mentioned the defendant's U-turn which thwarted the officers' attempt to follow him from the scene of the crime. Once again, there was sufficient evidence independent of this gesture to establish probable cause.

In general, the lower federal courts seem to pay more attention to furtive gestures than does the Supreme Court. For instance, cases can be found where furtive gestures have been crucial in a court's finding that probable cause has been established. The use of a devious route through the back streets of a city after crossing the border,[97] a meeting in a secluded area on a bootleggers' route in the early hours of the morning,[98] the act of putting a hand to the mouth as narcotics agents approach,[99] the act of adjusting clothing beside a car in an area where a woman's screams have just been reported,[100] and the abnormal and obnoxious manner of a woman riding in a car with one who has just been implicated in the narcotics racket by an informer[101] have played a deciding role in different courts' determinations of probable cause.

Even though the lower courts often consider furtive gestures, such gestures alone usually will not be enough to establish probable cause. Probable cause must exist independently of the gestures. This is particularly true of flight. When flight is the gesture involved, the courts seem to follow the cue of the Supreme Court and refuse to accord much weight to fleeing itself.[102] The courts mention

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[96] *Supra* note 64.

[97] Lane v. United States, 321 F.2d 573 (5th Cir. 1963).

[98] United States v. Copes, *supra* note 87.

[99] Espinoza v. United States, 278 F.2d 802 (5th Cir. 1960).

[100] Ralph v. Pepersack, 218 F. Supp. 932 (D. Md. 1963).

[101] United States v. One 1963 Cadillac Hardtop, 224 F. Supp. 210 (E.D. Wis. 1963).

[102] Carter v. United States, 314 F.2d 386 (5th Cir. 1963); Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961); United States v. Burke, 215 F. Supp. 508 (D.Mass. 1963).

flight in cases where probable cause exists independently, but invariably fail to allow it to carry the load when the other factors can not establish probable cause.[103] The attitude of courts with respect to flight is well illustrated by a recent court of appeals case from the District of Columbia.[104] In this case, the court goes to extraordinary length in analyzing the many possible innocent interpretations of flight; in the process numerous psychological treatises which deal with man's reaction to police officers without regard to innocence or guilt are cited.

As pointed out above, there are cases that accord more weight to various other types of furtive gestures, but there are also cases which refute this approach and take the more restrictive view with respect to those same gestures. For instance, there are cases that have held the act of putting a hand to the mouth and fleeing at the approach of a narcotics agent[105] or turning down a side street to avoid an awaiting police car[106] or the execution of two U-turns combined with other suspicious driving after crossing the border[107] was insufficient to establish probable cause even when the officers had what seemed to be substantial grounds for suspicion prior to the gestures. Obviously the courts are not in complete agreement on the weight to be given furtive gestures; and since the gestures differ in each case, such agreement is probably impossible. It generally appears that the lower federal courts take the same conservative approach in this area that the Supreme Court does.

A factor related to furtive gestures which occasionally presents itself for consideration in the establishment of probable cause is the defendant's inability to explain his presence at a place where his presence throws suspicion on him. The real problem here is the timing of the arrest. If it took place before the defendant's inability to explain his presence became apparent, then such inability could not be considered in determining whether or not there was probable cause for the arrest.

Like the furtive gesture factor, the defendant's lack of an explanation is probably not accorded great weight; and if this is the only reason for the officer's belief of guilt it will not constitute probable cause.[108] But, if the defendant's unexplained presence is

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[103] Monnette v. United States, 299 F.2d 847 (5th Cir. 1962); Bruner v. United States, 293 F.2d 621 (5th Cir. 1961); United States v. Williams, 219 F. Supp. 666 (S.D.N.Y. 1963); United States v. Sala, 209 F. Supp. 956 (W.D. Pa. 1962); United States v. O'Leary, 201 F. Supp. 926 (E.D. Tenn. 1962); United States v. Murphy, 174 F. Supp. 823 (D.D.C. 1959).

[104] Miller v. United States, 320 F.2d 767 (D.C. Cir. 1963).

[105] Taglavore v. United States, *supra* note 102.

[106] Price v. United States, 262 F.2d 684 (10th Cir. 1959).

[107] Plazola v. United States, 291 F.2d 56 (9th Cir. 1961).

[108] Ortiz v. United States, 317 F.2d 277 (5th Cir. 1963).

added to other factors which would seem to indicate his guilt, this one factor might be just what the government needs for a showing of probable cause.[109]

V. Procedure To Attack Probable Cause

The Burden of Proof

The procedural manner of attack employed by a defendant against what he deems a warrantless search or arrest without probable cause or a search warrant issued on something less than probable cause is a motion to suppress under Rule 41(e) of the Federal Rules of Criminal Procedure. The purpose of such a motion is to prevent the use of any evidence discovered by law enforcement officials during the course of an unreasonable search. Ordinarily, the success of such a motion dooms the prosecution to failure since the case against the defendant often turns upon the evidence uncovered by the search. Consequently, which party bears the burden of proof on the motion to suppress is a crucial factor.

The Supreme Court has never been squarely confronted with the question of which party has the burden of proof on a motion to suppress for lack of probable cause. Two Supreme Court cases indicate how the Court would hold and how the lower courts have held. In *Brinegar v. United States*,[110] a case involving a search without a warrant, the Court did not expressly hold that the government had the burden of proof, but in speaking of difference in degrees of proof necessary to establish guilt and probable cause, the Court assumed that the burden of proving both lies on the government. In *Jones v. United States*,[111] a case involving a search with a warrant, the Court indicated that the party challenging the validity of the search should bear the burden of establishing its invalidity. It is true that the Court was dealing primarily with a question of standing, but there also was a question of probable cause involved in the case.

Since a motion to suppress may be based upon any point which the defendant feels may render the search unreasonable, the vast majority of the cases which discuss the burden of proof state the general rule that the burden of proof is on the movant. A quick reading of the cases, therefore, gives the impression that this is the rule on burden of proof with respect to all motions to suppress. A close reading of this group of cases in which the motion to suppress is based upon an alleged lack of probable cause indicates

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[109] United States v. Zimple, 318 F.2d 676 (7th Cir. 1963); Ralph v. Pepersack, *supra* note 100.

[110] 338 U.S. 160 (1949).

[111] 362 U.S. 257 (1960).

that this rule does not apply absolutely.[112] Rather, the distinction between warrantless searches and searches with a warrant drawn by the two Supreme Court cases cited above is adopted and applied by the lower federal courts. The result is that if the attack is on a warrantless search and is based on an alleged lack of probable cause, the burden of proof is on the government to show that there existed grounds for the officers' good faith belief of probable cause before the search. If the attack is on a search made with a warrant and is based on an allegation that the warrant was issued on something less than probable cause, the burden of proving that allegation is on the defendant.[113] Fairness demands that this distinction be drawn and that the government bear the burden of proof at least in cases of warrantless searches. From a practical standpoint, it would be impossible for a defendant to prove a lack of probable cause in the abstract. The defendant cannot be expected to prove a lack of some item until he knows on what the government bases its claim of its existence.

In addition, there are several other exceptions to the general rule that the movant has the burden of proof on a motion to suppress. First of all, the government always has the burden of proving consent on the part of the defendant by clear and positive evidence if it seeks to justify the search on that basis.[114] Secondly, if the defendant is successful in establishing that a search was illegal and that certain items were seized by the government, the burden then shifts to the government to prove that its evidence has an origin independent of the illegal search.[115]

Finally, defendant's counsel must be careful to file any motion to suppress before the trial. The trial court has discretion to entertain such a motion after the trial has begun, and it is very doubtful that a judge would refuse to hear such a motion in view of the criminal nature of the proceedings; but, as a rule, if there is a valid

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112 United States v. Rivera, 321 F.2d 704 (2d Cir. 1963); Plazola v. United States, *supra* note 107; Cervantes v. United States, 278 F.2d 350 (9th Cir. 1960); Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955).

113 Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); Batten v. United States, 188 F.2d 75 (5th Cir. 1951); United States v. Nagle, 34 F.2d 952 (N.D.N.Y. 1929); United States v. Nepela, 28 F.2d 898 (N.D.N.Y. 1928); United States v. Boscarino, 21 F.2d 575 (W.D.N.Y. 1927); United States v. Goodwin, 1 F.2d 36 (S.D. Cal. 1924).

114 Channel v. United States, 285 F.2d 217 (9th Cir. 1960); United States v. Gregory, 204 F. Supp. 884 (S.D.N.Y. 1962); United States v. Rutheiser, 203 F. Supp. 891 (S.D.N.Y. 1962); United States v. Regina, 200 F. Supp. 709 (E.D.N.Y. 1961); United States v. DeVivo, 190 F. Supp. 483 (E.D.N.Y. 1961).

115 United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950); United States v. Lipshitz, 132 F. Supp. 519 (E.D.N.Y. 1955).

objection to a search, it should be raised by motion prior to the trial.[116]

Disclosure of Identity of Informers on Motion To Suppress

There are two Supreme Court cases of importance which deal with the requirement of disclosure in the face of a plea of privilege on the part of the government.[117] The first of these, *Roviaro v. United States*,[118] is confusing and seems to have given the lower federal courts trouble in its application. The second, *Rugendorf v. United States*,[119] is too recent to have created much comment yet. It appears, however, that this case may further complicate this legal problem and that it may have greatly reduced a defendant's chance of forcing disclosure on a motion to suppress for purpose of testing probable cause.

In *Roviaro*, two federal narcotics agents were notified by an informer that he was to make a purchase of narcotics from the defendant at a given time. The agents met the informer on a street corner and searched both his person and his car, finding no contraband. One of the agents then got into the informant's car trunk while the other followed closely in his car. Soon the defendant arrived, entered the informant's car, and ordered him to drive around. During this time the agent in the trunk heard the defendant instruct the informant to stop and turn off the lights so that they might "lose a tail" if there had been one. He also heard defendant question the informant concerning money that the former owed him. Finally, he heard defendant say that he had brought the informer "three pieces this time." When the car stopped, the defendant got out and went to a tree near the road, picked up a package, threw it into the informant's car, waved to the informant, and walked off to another car and drove away. This latter sequence of events was seen by the second agent who had followed the informant's car. The package contained narcotics; and on learning this, the agents proceeded to defendant's home and arrested him. Before the trial the defendant moved for a bill of particulars including a request for the identity of the informant.[120] In addition, he sought during the trial

[116] Rabinowitz v. United States, 339 U.S. 59 (1950); Harris v. United States, 331 U.S. 145 (1947).

[117] Roviaro v. United States, 353 U.S. 53 (1957); Rugendorf v. United States, *supra* note 65.

[118] 353 U.S. 53 (1957).

[119] *Supra* note 65.

[120] The record in this case indicated that the identity of the informant was in fact known by the defendant and that the informant had died before trial. If either of these facts were true, the government privilege would not have been applicable, but the Court refused to assume that either was true since defendant denied knowing the identity of the informant.

to question witnesses about the informant's identity, but the trial court refused to require such disclosure over the government's plea of privilege. The Supreme Court reversed, holding that disclosure was required.

Two quotations from the Court's opinion indicate the significance of *Roviaro* on the question of the disclosure requirement as it affects probable cause. The first of these quotations is properly noted by some lower courts when dealing with this question, and it generally leads them to the correct result. Speaking of disclosure, the Court said:

> Most of the federal cases involving this limitation [disclosure] on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.[121]

This language follows a previous passage which reads:

> Where the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential *to a fair determination of the cause,* the privilege must give way.[122]

These passages indicate that disclosure is required if there is not sufficient corroboration of the information considered independently of the informant's reliability. That is, no disclosure is required if there are other facts known by the officers sufficient to corroborate the information without regard to the informant's reliability, for the only time the identity of the informer is relevant to the issue of probable cause is when his reliability or lack of it is determinative of whether the information he gave was sufficiently corroborated to constitute probable cause. The Court did not, however, base its holding on this point. Rather, the Court required disclosure because the informant was the only other witness to the transaction. The Court reasoned that without the informant's testimony defendant could not refute the agent's testimony or prove his innocence; therefore, such testimony was essential to a fair trial. The "fair trial," of course, is a due process question rather than one of probable cause. In reaching the result in this case, the Court placed

[121] 353 U.S. 53, 61 (1957), citing Scher v. United States, 305 U.S. 251 (1938), Wilson v. United States, 59 F.2d 390 (3d Cir. 1932), and United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937).

[122] 353 U.S. at 60. (Emphasis added.)

great emphasis on the direct part the informant had played in the transaction, the circumstances he had prepared for it, and the situation which allowed him to hear what took place. This emphasis is acceptable when the issue presented is whether or not defendant will obtain a fair trial without disclosure. Disclosure will indicate the informer was a participant in the transaction, and the knowledge of such a participant may be vital to defendant's cause. When the question is whether or not an officer had probable cause on the basis of information to arrest or search, it is totally irrelevant whether the informant was a participant in the suspected crime. The question in such a case is not what the informant can testify to with respect to a possible defense, but whether he is reliable or not—whether his information was sufficiently corroborated to constitute probable cause. On that issue, whether the informant was present at the scene of the crime is irrelevant. Consequently, any lower court handling a request for disclosure for purposes of a determination on probable cause misconstrues *Roviaro* if it cites that case for the proposition that no disclosure will be ordered unless there has been participation in the transaction by the informant. The proper application of *Roviaro* in such a case would seem to be one which requires disclosure unless corroboration of the informant's tip, sufficient to establish probable cause, existed independently of the reliability of the informant.

The recent *Rugendorf* case does not clear up any of the difficulties in this area. If anything, it will make it more difficult for a defendant to force disclosure on a motion to suppress. In this case, the officers acquired a search warrant to search defendant's house on the basis of a tip from an informer that a quantity of stolen furs was located there. In addition, the affidavit pointed out that the informant's description of the furs matched the losses of a recent fur robbery and that defendant's brother was a known fence for professional burglars. The Court, in affirming the trial court's refusal to order disclosure, emphasized the information the officers had in addition to the informant's information which tended to corroborate this contribution. The Court felt that there was sufficient corroboration of the hearsay to justify the issuance of the warrant without disclosure of the informant's identity.[123]

In any event, the majority points out that the defendant relied solely upon his motion to suppress as grounds for his need for disclosure all the way to the court of appeals before he finally

[123] In this regard the Court cited the following language from Jones v. United States, "as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants . . . to be produced . . . so long as there was substantial basis for crediting the hearsay." 362 U.S. 257, 272 (1960).

began asserting that he could not defend properly without the informant's testimony. The opinion states that he added this additional ground for disclosure in the court of appeals in an attempt to bring himself within the *Roviaro* fact pattern. This comment by the Court is further indication that the Court does not regard *Roviaro* as authority on the question of disclosure where that question arises in connection with a reliability-probable cause issue on a motion to suppress. Rather, it indicates that the Court recognizes *Roviaro* as precedent on the fair trial-due process issue of the necessity of the informant's testimony at trial to defendant's defense.

Having so categorized *Roviaro,* the Court in *Rugendorf* then went on to distinguish *Roviaro* because there was no participation by the informant in the transaction in the case before the Court. They held therefore, that disclosure was not required to insure the defendant a fair trial.

Even the dissenters in *Rugendorf* did not feel that disclosure was necessary on the motion to suppress.[124] They based their dissent on *Roviaro* and their feeling that the informant's testimony was necessary at trial to insure the defendant a full opportunity to present his defense.

In conclusion, *Roviaro* does not deal directly with the necessity for disclosure on a motion to suppress for lack of probable cause although it does indicate that disclosure will be required in such a case if there is not sufficient evidence apart from the informant's reliability to corroborate his hearsay statement. This is indicated by the Court's citation of cases to this effect without disapproval. *Rugendorf,* on the other hand, does deal with the problem but merely holds that in that case there was sufficient evidence independent of the informant's reliability to corroborate his tip; therefore, disclosure was not required. This seems to leave intact the rule that disclosure will be required where the existence of probable cause rests on a hearsay statement of an informer and where such a statement is corroborated principally by the asserted reliability of the informant.

The difficulty experienced by lower federal courts in dealing with the necessity for disclosure of the informant on a motion to suppress for lack of probable cause seems to have arisen from one of two basic mistakes. The first and most prevelant mistake occurs in cases where an arrest or search is made on the basis of information uncorroborated by independent facts which is received from an informer. In such cases, the courts often refuse to require disclosure but at the same time find that probable cause existed,

[124] 376 U.S. 528, 537 (1964).

basing their finding of probable cause on *Draper*.[125] Generally it is true that the independent corroborating facts in these cases are as strong as those in *Draper*. These courts fail to realize, however, that in *Draper* the identity of the informer was disclosed, and his past reliability supplied the Court with additional corroborating evidence on which to base its findings of probable cause. In light of the limited corroborating facts, independent of the informant's past reliability, it is likely that the Supreme Court in *Draper* would not have favored probable cause had the defendant possessed the additional argument that the informer could not have been presumed reliable since his identity had not been disclosed. Since the defendant in *Draper* did not have that argument at hand, reliance on *Draper* in a case where there has been no disclosure is not convincing.

In *United States v. One 1957 Ford Ranchero Pickup Truck*,[126] the Alcohol Tax Unit Agents and local police had received several tips that the defendants were engaged in the illicit liquor business in a different part of the county. Then on the day of the arrest they were notified by an informant that the defendants would be bringing the whiskey into town at a given time in a truck. The make, model and license number of the truck was also given. On the basis of this information the officers waited for the defendant's truck, and when it passed they stopped it. One defendant immediately asserted that the whiskey was not hers; and the officers, seeing several jugs in the truck, arrested the passengers and searched the truck. The court refused to compel disclosure but found probable cause after stating that the fact pattern was identical to that of *Draper*. It is true that a dispute could arise over the question when the arrest occurred. If it did not occur until after the defendant had made her disclaimer of ownership, then perhaps probable cause did exist without the identity of the informer to corroborate the information. However, it seems more likely that the arrest took place when the officers stopped the truck. Certainly it was their intention to arrest at that time and to search the truck. If the arrest did take place at that moment, it is difficult to imagine how probable cause existed without disclosure of the informant's identity, for without his reliability as corroboration, there was little reason to believe defendants were committing a crime. The officers had even less independent corroborating fact than existed in *Draper*. Furthermore, the court indicated that it did not feel that disclosure could ever be justified on a motion to suppress. The court said, "But we do not think the

[125] 358 U.S. 307 (1959).

[126] 265 F.2d 21 (10th Cir. 1959).

identity of the informant material to the reliability of the information he gives."[127] This sweeping statement seems totally without basis since common sense would indicate that the identity of the informant and his reputation or characteristics should be very important in determining his reliability.

Several other cases which cite *Draper* in this manner and ignore the fact that there was disclosure in that case are *Laive v. United States*,[128] *Buford v. United States*,[129] *Bruner v. United States*,[130] and *Jones v. United States*.[131]

However, some of the courts have not made this mistake, but have pointed out in their opinions[132] that there was disclosure in *Draper*. Of these, *United States v. Robinson*,[133] represents what would seem to be the correct analysis of the problem. That court recognized that *Draper* was not controlling unless there was disclosure and then held that, since without the tip there would be no probable cause, the reliability of the informant was a central issue, and it was, therefore, not error to require disclosure.

A second error made by some lower federal courts in this area is undue emphasis on the question of whether or not the informer was a direct participant in the arresting transaction. This fact has no relevancy in determining the informant's reliability, which is the main reason for requiring disclosure. The over-emphasis placed on this factor arises from the Supreme Court's position in *Roviaro*;[134] but, as noted above, that emphasis was made with respect to the necessity of disclosure for purposes of testimony at trial and not with respect to reliability and probable cause. By incorrectly emphasizing this factor the courts may deny disclosure when it should be required.

A good example of such misplaced emphasis is *Jones v. United States*[135] where, on a motion to suppress for lack of probable cause, the court held that *Roviaro* was inapplicable because it dealt with a case where the informer helped set up the crime and took part in it. Because that was not true of the informer in the case before it, the court decided that *Roviaro* was not controlling. The court failed to recognize that identity was relevant to the reliability of

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127 *Id.* at 26.

128 321 F.2d 573 (5th Cir. 1963).

129 308 F.2d 804 (5th Cir. 1963).

130 293 F.2d 621 (5th Cir. 1961).

131 271 F.2d 494 (D.C. Cir. 1959).

132 United States v. Robinson, 325 F.2d 391 (2d Cir. 1963); Cochran v. United States, 291 F.2d 633 (8th Cir. 1961).

133 325 F.2d 391 (2d Cir. 1963).

134 *Supra* note 127.

135 271 F.2d 494 (D.C. Cir. 1959).

the informer. To compound its error the court held that *Draper* was applicable and controlling. The dissent in *Jones* is a good example of the proper analysis in this type of case. It essays a proper reading of *Roviaro* and recognizes that *Roviaro* and *Draper* are inseparably intertwined.

Other examples of placing improper emphasis on the informant's lack of participation in the transaction are *Mosco v. United States*[136] and *United States v. Whiting*.[137] In both of these cases the courts reached the correct result in refusing to order disclosure, for in both cases there was sufficient corroboration of the hearsay statement to establish probable cause independent of the informant's reliability. However, in both cases the courts devoted considerable time to distinguishing *Roviaro* on the basis of the informant's participation in the transaction. Further pointing out the error of the above mentioned courts are the numerous opinions in the lower courts which analyze the problem correctly and hold that disclosure on a motion to suppress depends on the degree of corroborating evidence apart from the informant's reliability, not on his participation in the act.[138]

Having observed when and why the courts do order disclosure, it is helpful to note why the identity of the average informer is so often a key factor in a determination of probable cause. The informer, particularly the narcotics informer, is often himself engaged in the same illicit business as the defendant and is often paid for his information in cash, narcotics, immunity from prosecution, or lenient punishment. Under such stimulation, it is to be expected that the informer will not infrequently reach for shadowy leads or even seek to incriminate the innocent. For instance, an investigation of the situation in New York City in 1931 revealed that of one hundred-fifty vice cases based on the reports of informers, forty were found to have been falsely accused.[139] Figures such as these make it plain that the defendant should be afforded the opportunity to delve into the reliability of his informer, unless the independent evidence corroborating his statement is strong enough to establish probable cause without any doubt.

In addition, the advocate should take note of the following three procedural points which may affect his client's case if a problem of disclosure arises. First, the right to disclosure is not auto-

136 301 F.2d 180 (9th Cir. 1962).

137 311 F.2d 191 (4th Cir. 1962).

138 United States v. Robinson, *supra* note 132; Buford v. United States, 308 F.2d 804 (5th Cir. 1962); Costello v. United States, 298 F.2d 99 (9th Cir. 1962); Cochran v. United States, *supra* note 132; Peisner v. United States, 198 F. Supp. 67 (D. Md. 1961).

139 Hopkins, Our Lawless Police 105 (1931).

matic. If the defendant does not make application to the court for disclosure, he cannot complain on appeal regardless of the merits of the potential claim.[140] Second, even if disclosure is ordered, the government is not the guarantor of the informer's appearance in court.[141] It is up to the defendant to find him, although the defendant should be granted a stay to locate him.[142] Third, if the defendant knows who the informer is, an order refusing disclosure is not error.[143]

Finally, there is the question whether the government can avoid the implication and mandate of *Roviaro*—avoid the necessity of disclosure—merely by making no attempt to inform itself fully of the identity of its informers. The court in *United States v. Oropeza*[144] questions whether the government is under a duty to make a good faith effort to get the names and addresses of informers, but this query appears never to have been satisfactorily answered. It would seem that if the identity of an informer is necessary to the fair determination of the cause, the defendant's rights ought not be forfeited by reason of the government's intentional or inadvertent failure to obtain such information.

VI. Conclusion

This article has been an attempt to acquaint the practitioner with some of the problems presented in determining the existence of probable cause. Although no clear-cut statement can be made concerning when a court will find probable cause to be present, it is hoped that this article has provided its reader with helpful guidelines.

In approaching probable cause by a factual analysis, it is evident that the courts consider the factors of area, previous criminal activity, and time, and effectively refuse to consider submission to arrest or good faith on the part of the arresting officer. It also appears likely that the extension of the exclusionary rule to the states, *inter alia,* has resulted in a general dilution of the probable

140 United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); United States v. Walker, 246 F.2d 519 (7th Cir. 1957); United States v. Colletti, 245 F.2d 781 (2d Cir. 1957).

141 United States v. Cimino, 321 F.2d 509 (2d Cir. 1963); United States v. Holiday, 319 F.2d 775 (2d Cir. 1963); Williams v. United States, 273 F.2d 781 (9th Cir. 1959), *cert. denied,* 362 U.S. 951 (1960); Eberhart v. United States, 262 F.2d 421 (9th Cir. 1958).

142 United States v. White, 324 F.2d 814 (2d Cir. 1963); United States v. Glaze, 313 F.2d 757 (2d Cir. 1963); Sartain v. United States, 303 F.2d 859 (9th Cir.), *cert. denied,* 371 U.S. 894 (1962).

143 United States v. Gernie, 252 F.2d 664 (2d Cir.), *cert. denied,* 356 U.S. 968 (1958).

144 275 F.2d 558 (7th Cir. 1960).

cause standard. The evidentiary problems of probable cause center around corroboration of the hearsay information and reliability of the informer.

In the final analysis, the real dilemma presented by probable cause is whether the rights of the individual should be preserved at the expense of the protection of society. As Justice Cardozo stated:

> The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice.[145]

William C. Moul

[145] People v. Defore, 242 N.Y. 13, 24, 150 N.E. 585, 589 (1926).